INDEX TO PETITION

	PAGE
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Provision of Constitution Involved	4
Statement of Facts	4
Specifications of Error to Be Urged	7
Reasons for Granting of Writ	7
Conclusion	8

INDEX TO BRIEF

Argument	9
I. Petitioners were deprived of equal protection of the law and of due process	9
II. A denial of constitutional rights may occur through judicial determination as well as by legislative enactment	12
III. The requirement that a plaintiff must exclude every possible cause for the injury other than	

PAGE

the defendant's negligence, deprives the plaintiff of his right to trial by jury and of due process 14

Conclusion 18

TABLE OF CITATIONS

Biesecker v. Pennsylvania R. Co., 276 Pa. 87, 90, 119 A. 821 (1927) 11
Brooks v. Morgan, 331 Pa. 235, 200 A. 81 10

DeNardo v. Stephens-Jackson Co., 261 Pa. 230, 104 A. 584 (1918) 10
Department of Banking, State of Nebraska v. Pink, 317 U. S. 264, 266, 63 S. Ct. 233, 234 (1942) 6

Ellis v. Union Pac. R. Co., 329 U. S. 649, 67 S. Ct. 598 (1947) 16

Fay v. People of the State of New York, 332 U. S. 261, 67 S. Ct. 1613 17
Fourteenth Amendment to U. S. Constitution 4

Gallivan v. Wark Co., 288 Pa. 443, 456, 136 A. 223 (1926) 11

Jones v. Monroe Electric Co., 350 Pa. 539, 39 A. 2d 569 (1944) 10

King v. Darlington Brick & Mining Co., 284 Pa. 277, 283, 131 A. 241 (1945) 11

Lanzetta v. State of New Jersey, 306 U. S. 451, 59 S. Ct. 618 (1939) 14
Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1946) 7, 15, 16, 17, 18

PAGE

Melville v. State of Maryland to the use of Morris, et al., 155 F. 2d 440 (1946) 16, 17

Mooney v. Holohan, 294 U. S. 103, 113, 55 S. Ct. 340, 342 (1935) 13

Morris v. Jefferson Electric Co., 278 Pa. 361, 123 A. 321 10

Myers v. Reading Co., 331 U. S. 447, 67 S. Ct. 1334 (1947) 7, 14, 16, 18

Palko v. State of Connecticut, 302 U. S. 319, 58 S. Ct. 149 (1937) 16

Shelley v. Kraemer, 68 S. Ct. 836, 844 (1948) 13

Skinner v. State of Oklahoma, 316 U. S. 535, 62 S. Ct. 1110 (1942) 13

Straight v. B. F. Goodrich Co., 354 Pa. 391, 47 A. 2d 605 (1946) 11

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 (1944) 15, 17, 18

Wenthold v. O'Dea, 338 Pa. 33, 12 A. 2d 115 10

Zeher v. City of Pittsburgh, 279 Pa. 168, 123 A. 687 10

IN THE
SUPREME COURT OF THE UNITED STATES.

Term, 194 No.

JOSEPH C. SHARBLE,
Petitioner,
vs.
KUEHNLE-WILSON, INC.,
Respondent,

CHARLES HOOKER,
Petitioner,
vs.
KUEHNLE-WILSON, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Joseph C. Sharble and Charles Hooker, petitioners, pray that a writ of certiorari issue to review the judgment of the

Supreme Court of Pennsylvania entered in the above case on October 1, 1948.

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania is reported in 359 Pa. 494, 59 A. 2d 58 (1948). The opinion of the lower court is not reported. (Court of Common Pleas of Philadelphia County, No. 4 and No. 2—tried in Court of Common Pleas No. 7—June Term, Nos. 2251 and 2252.)

JURISDICTION.

The final judgment of the Supreme Court of Pennsylvania was entered on October 1, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

QUESTIONS PRESENTED.

1. Where the petitioners showed facts from which the jury admittedly could have found the respondent negligent, did not the Supreme Court of Pennsylvania deprive the petitioners of the equal protection of the law and of due process, guaranteed by the Fourteenth Amendment to the Federal Constitution, when it imposed on these petitioners the burden also of excluding every other possible cause for which the respondent was not responsible, although concurrently, with respect to other litigants, under the same legal circumstances, it arbitrarily and capriciously enunciates and follows the inconsistent and totally irreconcilable principle of law that a plaintiff is not required to exclude every conceivable factor causing or contributing to the injury, or which the ingenuity of defendant's counsel may suggest as a possible cause therefor?

2. Under the circumstances of this case, were not the "equal protection" and "due process" clauses of the Fourteenth Amendment to the Federal Constitution violated by the Supreme Court of Pennsylvania by its decisional law, in same measure as though the result had been arbitrarily reached under irreconcilable and conflicting enactments of the Pennsylvania state legislature?

3. Did not the Supreme Court of Pennsylvania err in entering judgment n. o. v. for the respondent where it admitted that from all the evidence the jury might logically have drawn the inference that there was negligence, but decided against the petitioners on the sole theory that the evidence might likewise have supported the theory that there was no negligence? Does not this position of the Supreme Court of Pennsylvania deny to the petitioners due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States?

PROVISION OF CONSTITUTION INVOLVED.

The Fourteenth Amendment to the Constitution of the United States which, in its pertinent parts, provides:

> "* * * No state shall make or enforce any law which shall prejudice the privileges * * * of citizens of the United States; nor shall any state deprive any person of * * * property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE FACTS.

This is an appeal by the petitioners from the action of the Supreme Court of Pennsylvania in entering judgment n. o. v. for the respondent. There had been a jury verdict in favor of the petitioners. A motion for new trial and for judgment n. o. v. had been refused by the Court *en banc*,* and judgment entered on the verdict for the petitioners. An appeal was then taken to the Supreme Court of Pennsylvania by the respondents. The Supreme Court of Pennsylvania entered judgment n. o. v. for the respondent on May 24, 1948.

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* In Philadelphia County, Pennsylvania, each Court of Common Pleas consists of three judges, who sit "en banc" together to decide motions for judgment n. o. v. and for new trial.

Petitions for re-argument by petitioners here were refused, first on July 6, 1948, and finally, on October 1, 1948.

The petitioners were roofers engaged in the erection of a roof on a large metal building at Eddystone, Pennsylvania. At the same time, the respondent, Kuehnle-Wilson, Inc., was fulfilling its painting contract on the same building. The roof being erected consisted of a series of pre-fabricated sections of light-gauge sheet steel which were to be pressed together by means of ribs into pre-determined positions, so as to make a substantially continuous surface on the weather side of the roof.

The ribs were to be laid across the eave girder and the purlin; then, after the first sheet is attached to the purlin, each sheet is then fastened to the far side of the preceding one, away from the purlin. Prior to the petitioners and others starting their work of erecting the roof by placing in position these individual sheets, the respondent painting contractor had been notified to paint the structural work involving the purlins preparatory to installation of the roof sheets. This paint work was purportedly done, and the painting contractor notified the petitioners' employer that the petitioners and others could begin to lay the sheets. After several of the sheets had been laid in place, they began to slip while the petitioners were standing on them, as a result of which the petitioners were thrown from the roof to the ground, many feet below.

From the evidence, the jury could have found that the reason for the sheets slipping was that the painting contractor had not allowed the paint to dry adequately, and had in fact mistakenly assured the petitioners' employer that the paint had dried sufficiently for them to proceed with their work.

There was evidence that after the accident, paint similar to that on the purlins was found on the arms of the petitioners; and that there were smudges of paint on the roof sheets which had dropped to the ground when the petitioners fell; that there was no such paint on these sheets before they

were laid by the petitioners; and that there were marks on the sheets which showed the imprint of paint. Also, there was evidence that *as late as the day after the accident happened*, by merely rubbing the purlin with his thumb, a witness determined that the paint was still wet.

The Supreme Court of Pennsylvania, in entering judgment n. o. v., reviewed all of these various factors and resolved that they were not conclusive as to the cause of the accident, saying that the accident "could have been caused" by the petitioners and others walking over the slanted surface that had not been securely fastened. Said the Court:

> "Such a *possibility* was not precluded by the evidence. At any rate, the testimony is not such as to provide that the *only* reasonable inference is that the alleged negligence of defendant was the cause of plaintiffs' injuries." (Emphasis supplied.)

In other words, the Court recognized that while a jury might have concluded from these facts that there was wet paint which had caused the sheets to slip, others might just as reasonably have concluded that it was due to some other cause for which the respondent was not responsible, and therefore the petitioners had failed to meet their burden of proof, i. e., *excluding every other possible cause.*

The questions of constitutional law here raised were presented to the Supreme Court of Pennsylvania in the Supplemental Petition for Re-Argument and were rejected on October 1, 1948.*

This petition for certiorari follows.

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* That this petition for certiorari is timely, see DEPT. OF BANKING, STATE OF NEBRASKA v. PINK, 317 U. S. 264, 266, 63 S. Ct. 233, 234 (1942).

SPECIFICATIONS OF ERROR TO BE URGED.

1. In entering judgment for the respondent.

2. In failing to affirm the trial Court and the Court *en banc* in entering judgment for the petitioners.

3. In violating the constitutional rights and privileges of the petitioners.

REASONS FOR GRANTING OF WRIT.

1. Petitioners' constitutional guarantee of trial by jury, under the Federal Constitution, has been violated.

2. The decision of the Supreme Court of Pennsylvania is in direct conflict with the principle of the decisions of this Court in MYERS v. READING CO., 331 U. S. 447, 67 S. Ct. 1334 (1947), and in LAVENDER v. KURN, 327 U. S. 645, 66 S. Ct. 740 (1946).

3. Under the conflicting rules concurrently recognized and followed by the Supreme Court of Pennsylvania, it has arbitrarily and without distinction in this case imposed on these petitioners a greatly heavier burden of proof than it imposes on others in cases raising precisely the same legal question.

CONCLUSION.

The writ should be granted.

Respectfully submitted,

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GEORGE H. DETWEILER,
RICHTER, LORD & FARAGE,
By: B. NATHANIEL RICHTER,
Counsel for Petitioners.

BRIEF.

ARGUMENT.

I. Petitioners were deprived of equal protection of the law and of due process.

The basic liability of the respondent in this case rests upon the generally recognized principle of tort law accepted and expressed by the Supreme Court of Pennsylvania in its opinion in the instant case, at page 499, where it said:

> "'* * * it is the duty of independent or different masters engaged about the same general employment to use such ordinary care and diligence in the conduct and prosecution of their several contracts or employments so as not to expose the servants of the master working with them to danger and if injury results to the servants of either, through failure to exercise such care and diligence, the master whose servants caused the injury will be liable in damages: Johnston v. Ott Bros., 155 Pa. 17; Alexander v. Maryland Steel Co., 189 Pa. 582; Kitchin v. Riter-Conley Co., * * * [207 Pa. 558]; Urban v. Focht, 231 Pa. 623.' See also Bisson v. John B. Kelly, Inc., 314 Pa. 99, 170 A. 139."

The petitioners' contention is that the evidence supports a finding that the respondent carelessly instructed the petitioners to proceed with their work on this building at a time when it knew or should have known that its own painting work on the job had not yet been finished, and that therefore it was not yet safe for the petitioners to proceed with the steel work.

The primary issue before the Supreme Court of Pennsyl-

vania on appeal was: were there sufficient facts from which the jury could have found evidence of such negligence? The Supreme Court of Pennsylvania, in entering judgment for the respondent, implicitly recognized that the evidence could well have supported a jury finding that there *was* such negligence which caused the injuries. The Court, however, held that the evidence pointed to other possible causes for the accident and ruled:

> "At any rate, the testimony is not such as to provide that the *only* reasonable inference is that the alleged negligence of defendant was the cause of plaintiff's injuries." (Emphasis supplied.)

The difficulty with the decision is this: that although the Supreme Court of Pennsylvania in the instant case* followed that standard of proof, contemporaneously and concurrently, through the last hundred volumes of Pennsylvania Reports up to the very present time, it has expressed and continues to express an absolutely irreconcilably contrary standard of proof, which has been enunciated as follows:

> "However, 'It is not necessary for the plaintiff to exclude everything which the ingenuity of counsel may suggest as possibly causing or contributing to an accident.'" JONES v. MONROE ELECTRIC CO., 350 Pa. 539, 39 A. 2d 569 (1944).

As far back as DE NARDO v. STEPHENS-JACKSON CO., 261 Pa. 230, 104 A. 584 (1918), the Court said, at page 233:

> "Where the evidence points to a certain cause for an accident, which would fasten liability upon the defen-

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* For other examples in the long line of cases following the same rule, see Morris v. Jefferson Electric Co., 278 Pa. 361, 123 A. 321; Zeher v. City of Pittsburgh, 279 Pa. 168, 123 A. 687; Brooks v. Morgan, 331 Pa. 235, 200 A. 81; Wenthold v. O'Dea, 338 Pa. 33, 12 A. 2d 115.

dant, the plaintiff will not be denied redress because there may be some other possible cause for the accident. In such case, the question is for the jury."

See also: KING v. DARLINGTON BRICK & MINING CO., 284 Pa. 277, 283, 131 A. 241 (1925); GALLIVAN v. WARK CO., 288 Pa. 443, 456, 136 A. 223 (1926); and what is probably the leading case in Pennsylvania—BIESECKER v. PENNSYLVANIA R. CO., 276 Pa. 87, 90, 119 A. 821 (1927); also STRAIGHT v. B. F. GOODRICH CO., 354 Pa. 391, 47 A. 2d 605 (1946).

This contrary standard of proof has been expressed and followed contemporaneously with that uttered in the instant case. The result of the co-existence of this anomalous situation is that the Supreme Court of Pennsylvania has arbitrarily arrogated to itself the function of a jury—it reads the factual record and then, depending upon how it would have decided the case had it sat instead of the jury, applies one standard of proof or the other. Obviously, this results in arbitrary discrimination between litigants under precisely the same legal circumstances. Every litigant is entitled to the same legal standard of proof in the same type of case.

The problem before this Court now is: whether the highest appellate court in any state may announce and maintain concurrently two separate, irreconcilable principles of law, and reserve the arbitrary power to apply one or the other as a particular case appeals to the predilection of the court, notwithstanding the finding of the jury to the contrary. Equality before the law is thus impossible and only discrimination can exist if a court may reserve to itself such power.

All litigants or none should be required to exclude every possible cause for the plaintiff's injury other than the re-

spondent's negligence; all litigants or none should be permitted to sustain a jury verdict even though they cannot exclude every possible cause for the plaintiff's injury other than the respondent's negligence, or all the causes which the ingenuity of counsel may suggest.

We believe it cannot be doubted that equal protection of the law and due process are denied where a court applies one rule of law to one litigant and, under identical legal circumstances, applies an opposite rule of law to another. And yet, this is precisely what the Supreme Court of Pennsylvania has done.

II. A denial of constitutional rights may occur through judicial determination as well as by legislative enactment.

The Supreme Court of Pennsylvania has set up, as we have just indicated, two diverse and irreconcilable standards of proof for application to cases involving the same set of facts, and has reserved to itself the right to apply either at its own fancy. Had the legislature of Pennsylvania enacted two statutes, of equal validity, establishing two contrary and irreconcilable standards of proof in the same type of case, without any rational basis for distinction, this Court would necessarily have to strike down one or both, as denying the equal protection of the law.

Suppose the legislature of Pennsylvania had enacted two general criminal statutes, of equal validity, the one requiring in all criminal cases that the Commonwealth prove the defendant's guilt beyond a reasonable doubt, and the other requiring only that the Commonwealth prove the defendant's guilt in the same crime by a mere preponderance of the evidence, and had left the determination of which standard of proof to apply, to the arbitrary inclination of the trial judge. It is clear that in such case, a defendant tried under the latter statute would be denied the equal protection of the law, so long as any other defen-

dants prosecuted for the same crime were afforded the protection of the standard of proof under the first statute. Cf. SKINNER v. STATE OF OKLAHOMA, 316 U. S. 535, 62 S. Ct. 1110 (1942), holding unconstitutional, as denying equal protection, an Oklahoma statute calling for sterlization of persons convicted of larceny by fraud, but exempting from such sterilization persons convicted of the very similar crime of embezzlement.

If a state legislature is not permitted so to deprive its citizens of the equal protection of the law, *a fortiori*, the judiciary, which has no legislative power, should not be able, by mere decisional law, to use, create and employ two co-extensive, irreconcilable standards of proof for the same set of facts. Constitutions protect the individual from judicial, as well as from legislative, encroachments upon personal liberty or arbitrary discrimination.

See MOONEY v. HOLOHAN, 294 U. S. 103, 113, 55 S. Ct. 340, 342 (1935), where this Court said:

> "That [Fourteenth] Amendment governs any action of a state, 'whether through its legislature, through *its courts*, or through its executive or administrative officers.'" (Emphasis supplied.)

In SHELLEY v. KRAEMER, 68 S. Ct. 836, 844 (1948), this Court forever removed all doubt that the actions of *courts*, as well as of the legislative bodies and the executive branches, of the several states, could offend the protections of the Fourteenth Amendment to the Federal Constitution. The Court added that this protection against state judicial action is not limited to cases where the proceedings might be held to have been procedurally unfair. Said the Court:

> "It has been recognized that the action of state courts in enforcing a substantive common law rule formulated by those courts, may result in denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in

complete accord with the most rigorous conceptions of procedural due process."

Nor can it be argued with conviction that the protection against violation, by the judiciary, of the Fourteenth Amendment, is limited to those cases involving discrimination because of distinctions of race, color or creed. However abhorrent such arbitrarities may appear, nothing can approximate the opprobriousness of a self-created residuum of power by a judiciary to deal out different law to different litigants in the same class of case; particularly is this true if there can be no appeal therefrom.

Not only are such dual standards unconstitutional because they deny the equal protection of the law, but they are vulnerable for the further reason that they destroy all semblance of certainty in the law. Cf. LANZETTA v. STATE OF NEW JERSEY, 306 U. S. 451, 59 S. Ct. 618 (1939), where this Court struck down a criminal statute enacted in New Jersey because the uncertainty of its application rendered it repugnant to the due process clause of the Federal Constitution. *A fortiori*, two standards of proof, clearly repugnant to each other, but of equal validity, and applicable to the same set of facts, must be unconstitutional, since uncertainty in such cases is inevitable, due to the insoluble contradiction between two standards of proof.

III. The requirement that a plaintiff must exclude every possible cause for the injury other than the defendant's negligence, deprives the plaintiff of his right to trial by jury and of due process.

In the case of MYERS v. READING COMPANY, supra, 63 F. Supp. 813, at 821, the Trial Judge, in entering judgment n. o. v. after verdict for the plaintiff, said:

"From the paucity of proof offered by plaintiff the jury might logically draw the inference that the brake was inefficient and might have just as logically drawn the inference that the brake reacted normally and ef-

ficiently under the circumstances. Since the evidence supports equally two inconsistent inferences of fact, it establishes neither. In this situation the jury should not have been permitted to draw conclusions from plaintiff's evidence regarding the inefficiency of the brake since their conclusion of necessity would have to be based on conjecture and speculation."

This Court held that that standard of proof was unconstitutional, as being deprivative of the right to trial by jury, 331 U. S. 447.

Similarly, in LAVENDER v. KURN, supra, and TENNANT v. PEORIA & P. U. RY. CO., 321 U. S. 29, 64 S. Ct. 409 (1944), where, at 412, this Court said:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235; Tiller v. Atlantic Coat Line R. Co., supra, 318 U. S. 68, 63 S. Ct. 451, 143 A. L. R. 967; Bailey v. Central Vermont Ry., 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely

> because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In the instant case, the Supreme Court of Pennsylvania fell into precisely the same error of the lower courts in both the MYERS and TENNANT cases, supra, and invaded the jury province.

It is true that both the LAVENDER and MYERS cases arose under the Federal Employers' Liability Act.* However, it is noteworthy that the case of LAVENDER v. KURN, supra, was tried in the state court. See also, ELLIS v. UNION PAC. R. CO., 329 U. S. 649, 67 S. Ct. 598 (1947), which was tried in the state courts of Nebraska.

Nor are we unmindful of the decision of this Court in PALKO v. STATE OF CONNECTICUT, 302 U. S. 319, 58 S. Ct. 149 (1937), where this Court ruled that consistently with the Bill of Rights, trial by jury may be modified by a state, or abolished altogether. However, we submit that if Pennsylvania intends to grant a right to trial by jury in civil actions, then it should be a right to trial by *jury*, and not one abridged by a super-control of the facts of the case by the judiciary. It must be a right in essence, and not in mere name only. The right to trial by jury must carry with it the right of a jury determination of the factual inferences to be drawn from the evidence, without the court exercising the privilege of searching the record for conflicting circumstantial evidence in order to take the case from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences. This Court

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* The right to trial by jury has been recognized by the Supreme Court of the United States as a constitutional right; it does not spring from or apply merely in Federal Employers' Liability Act cases. Cf. MELVILLE v. STATE OF MARYLAND to the use of MORRIS, et al., 155 F. 2d 440 (1946), a tort action in the federal court based on diversity of citizenship, in which the principle of LAVENDER v. KURN, supra, was expressly applied.

has directed that the right to trial by jury may not be made a sham. The essential nature of the right to trial by jury carries with it the ultimate disposition of the facts by the jury, and the jury alone.

As was said recently in FAY v. PEOPLE OF THE STATE OF NEW YORK, 332 U. S. 261, 67 S. Ct. 1613, at 1630:

> "The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures *but is essentially to protect the integrity of the trial process by whatever method the State sees fit to employ. No device, whether conventional or newly devised, can be set up by which the judicial process is reduced to a sham and courts are organized to convict. They must be organized to hear, try and determine on the evidence and the law.*" (Emphasis supplied.)

Inasmuch as these simple tort actions may, against the wish of a particular plaintiff, be removed under the appropriate federal statutes to a federal court because of the existence of diversity of citizenship, it becomes manifestly unfair to the litigants if the same standard of proof which is employed in the federal courts is not employed in state courts. See LAVENDER v. KURN, and TENNANT v. PEORIA & P. U. RY. CO., supra.

The rights of litigants should not depend upon the fortuitous circumstance of the particular forum in which the case is tried. That such disparity of standards of proof may follow in simple tort actions arising under state law, we need but compare the MELVILLE case, supra.

Conclusion.

It is respectfully urged that the action of the Supreme Court of Pennsylvania has deprived the petitioners in this case of due process and the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States; has deprived the petitioners of the right to trial by jury—contrary to the principle of the MYERS, LAVENDER and TENNANT cases, supra—and that its ruling makes the rights of litigants vary, depending on the forum. Therefore, this petition for certiorari should be granted and the original verdict of the jury should be reinstated.

Respectfully submitted,

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